No. 91-595

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION,
Petitioner,
v.
AVECOR, INC.,
and
NATIONAL LABOR RELATIONS BOARD,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENT AVECOR'S BRIEF IN OPPOSITION

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Avecor, Inc. respectfully requests this Court to deny the Union's Petition for Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the D.C. Circuit.

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[*] The caption submitted by the Union and docketed by the Clerk of the Supreme Court was that used when the underlying case was before the United States Court of Appeals for the District of Columbia. Counsel for Avecor, Inc. has been advised by counsel for the National Labor Relations Board that the caption herein correctly identifies the parties in this proceeding, and we ask that the docket be modified accordingly.

I. STATEMENT OF THE CASE

This case arises under the National Labor Relations Act ("Act"). 29 U.S.C. § 151, *et seq.* A National Labor Relations Board ("NLRB" or "Board") representation election was held on June 25, 1987 among certain employees of Avecor, Inc. ("Employer") at its plant in Vonore, Tennessee, pursuant to a petition filed by the Oil, Chemical and Atomic Workers International Union ("Union"). The Union was defeated in the election and thereafter filed both objections and unfair labor practice charges alleging numerous violations of Section 8(a)(1) and (3) of the Act.

The Board issued a Consolidated Complaint. The relief sought in the Complaint by the General Counsel included the imposition of a remedial bargaining order.

A hearing was held on the Complaint before NLRB Administrative Law Judge Hutton S. Brandon ("ALJ") on numerous dates in 1988. The decision of the ALJ issued and the case was transferred to the Board on September 30, 1988. The ALJ found no merit to many of the allegations in the Complaint, but ruled that the Employer committed certain violations of Section 8(a)(1) of the Act. The ALJ also found that the Employer's discharge of two (2) employees, Jeff Tidwell and Leroy Hamby, violated Section 8(a)(3) of the Act. Finally, the ALJ found that the Union attained majority status, as evidenced by signed authorization cards, on April 27, 1987, and ordered the Employer to recognize and bargain with the Union as the remedy for the unfair labor practices found.

The Employer filed exceptions to the ALJ's decision with the Board and on September 22, 1989, the Board issued its Decision and Order (published at 296 NLRB No. 94), in which it, with one minor exception, adopted the ALJ's decision *pro forma*.

The Employer filed a Petition for Review of the Board's decision with the D.C. Circuit Court of Appeals ("court") on October 24, 1989. On April 26, 1991, the court issued its opinion in which it overturned one of the two (2) 8(a)(3) findings and refused to enforce the bargaining order. It remanded the case to the Board with instructions to explain its interpretation of the stipulated election unit and whether the order entry clerk and lab secretary positions should be included, in light of apparently controlling Board precedent.

The court also directed the Board to reconsider whether a bargaining order was an appropriate remedy in this case. The court concluded that three factors prevented enforcement of the Board's bargaining order. First, since the court had extinguished at least one "hallmark violation" by finding the Hamby termination was lawful, the court directed the Board to consider whether the remaining unfair labor practices were serious enough, or pervasive enough, to prevent holding a rerun election. If the Board first resolved this issue in the affirmative, the court directed the Board then to consider the second factor: was a bargaining order appropriate in light of turnover in the voting unit that had occurred since the election? Lastly, regardless of how the Board resolved the second factor, the court directed the Board to provide a reasoned explanation for why a bargaining order, an extraordinary remedy, was required in this case as opposed to a second

election. The Union's Petition for Writ of Certiorari seeks review of the second factor only.

On August 14, 1991, the Board accepted remand of the case from the court and requested that all parties submit a statement of position concerning these issues. Each party has submitted its statement of position and the Board currently is reconsidering its decision to issue a bargaining order based on the court's instructions on remand. In the interim, the Union filed its Petition for Writ of Certiorari seeking review of that portion of the court's order directing the Board to consider evidence of employee turnover in deciding whether a bargaining order is an appropriate remedy. Because the Union is seeking review of only one aspect of the court's order and, as will be explained below, that issue may well become moot following the remand currently before the Board, the Union's Petition for Writ of Certiorari should be denied inasmuch as the controversy is not ripe for review.

II. ARGUMENT

THIS COURT SHOULD DENY THE PETITION FOR A WRIT OF CERTIORARI BECAUSE THE ISSUE PRESENTED IS NOT RIPE FOR REVIEW

The Union's Petition for Writ of Certiorari is premature. The D.C. Circuit Court of Appeals has remanded this case to the Board for the purpose of reconsidering whether a bargaining order is an appropriate remedy in light of the court's modified findings, observations and conclusions of law. The Board accepted the remand, but has not yet acted in accordance with the remand instructions.

The first issue to be considered by the Board in this regard is whether, in light of the appellate court's reversal of the Hamby termination and the court's characterization of the remaining unfair labor practices, is a bargaining order justified? In ordering the case remanded, the court stated:

> We have concluded that the Hamby firing was not unlawful, and we suggest that Ingram's isolated remark to Hamby was less heinous than the ALJ painted it. Consequently, "a significant question is presented whether the remaining unfair labor practices in this case are serious enough or pervasive enough, to have the tendency to undermine majority strength and prevent the holding of a fair election." *Pedro's, Inc. v. NLRB*, 652 F.2d 1005, 1011 (D.C. Cir. 1981). The Board must, therefore, consider whether the remaining violations justify a bargaining order.

P. 21(a) Petition for Writ of Certiorari.

The Union seeks review of the court's order directing the Board to consider evidence of bargaining unit turnover in deciding the appropriateness of a remedial bargaining order. However, the Board is *only* to address this issue if it *first* decides that a bargaining order is justified based on the unfair labor practice violations found. In light of the court's modified findings and observations, it is very possible that the Board will determine that the remaining violations do *not* justify a bargaining order. Therefore, the question the Union seeks to have reviewed in its Petition for Writ of Certiorari would be rendered moot. Accordingly, the question presented is not ripe for review by this Court and the Petition for Writ of Certiorari should be denied.

This Court has previously determined certiorari to be inappropriate in analogous circumstances. In *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327, 88 S. Ct. 437 (1967), an arbitration award had been rendered regarding the manning of trains and engines in freight service. The union contended the award expired as of a certain date and threatened to strike over the issue thereafter. The railroad obtained a restraining order in federal district court barring a strike prior to the expiration date, but the union called a work stoppage anyway. The district court held the union in contempt of the restraining order and levied substantial fines. The court of appeals ruled on various legal issues presented to it but remanded the case to the district court to determine whether there had, in fact, been contempt, and if so, whether it was of such a magnitude as to warrant the fine originally imposed. The union unsuccessfully sought review by the Supreme Court.

The Supreme Court held (per curiam):

> Petitioners seek certiorari to review adverse rulings made by the Court of Appeals. However, because the Court of Appeals remanded the case, it is not ripe for review by the Court. The petition for a writ of certiorari is denied. *See, Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 257-258 (1916).

389 U.S. at 328, 88 S. Ct. at 488.

In *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 36 S. Ct. 269 (1916), a shoe manufacturer brought suit against a competitor for trade-mark infringement and unfair competition. Following a

hearing, the trial court dismissed the complaint. The circuit court of appeals, however, reversed as to the unfair competition claim and found for the plaintiff. The court directed that the lower court issue an injunction against the offending practice and conduct an accounting limited to the period following the commencement of suit (to be supervised by a referee). The Supreme Court denied plaintiff's petition for writ of certiorari holding that the decree of the court of appeals was not a final one and therefore certiorari was denied.

The same result is mandated here. A petition for certiorari will be granted only when there are special and important reasons therefor. Rule 10, Supreme Court Rules. Those circumstances are not present here. The question sought to be reviewed is not ripe for review since there is a substantial likelihood the Board will conclude on remand that a bargaining order is not warranted and that the remedy of a second election is sufficient to protect the employees' rights under the Act. The Board has accepted the remand from the court of appeals and must first be given the opportunity to reconsider its decision. To grant the petition now would be to deprive the Board of its rightful responsibility to determine, in the first instance, the appropriate remedy.

III. CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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